ARKANSAS COURT OF APPEALS
NOT DESIGNED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION II

CACR 07-485

February 27, 2008

JESSICA MARIE WINKLER
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE DREW COUNTY CIRCUIT COURT
[NO. CR-06-92-3]

HONORABLE ROBERT BYNUM GIBSON, JR.,
JUDGE

AFFIRMED

In a bench trial, appellant Jessica Marie Winkler was found guilty of theft of property having a value less than $2,500 but greater than $500, which is a class C felony. As a consequence, she was sentenced as an habitual offender to three years in prison. Appellant contends on appeal that the evidence is not sufficient to sustain the verdict and that she was denied due process because the trial court did not consider her impeachment evidence. We affirm.

Appellant worked as a bookkeeper from February to October in 2005 for B&D Iron and Metal, a recycling business owned by Betty and Dennis Sipes. The business had a checking account with Commercial Bank in Monticello. Mr. and Mrs. Sipes were the only authorized signatories to the account, but filling out payroll checks and checks to pay bills were part of appellant's responsibilities. The company checkbook was kept at the Sipes's residence in a bedroom, which

served as the office.

As to the theft, the State alleged that appellant obtained without authorization money from the business checking account. The State introduced a series of checks as proof of the theft, as well as the testimony of Mr. and Mrs. Sipes. State's exhibit one was a check dated "August 2005" made payable to appellant in the amount of $400. The check was signed by "Betty Sipes." Mrs. Sipes stated that the check did bear her signature but that she often signed pages of checks at one time. Mrs. Sipes testified that this check was not authorized and that the money was deducted from the account.

State's exhibit two was a check dated July 1, 2005, that was also made payable to appellant in the amount of $400. Although it purported to be signed by Mrs. Sipes, Mrs. Sipes testified that it was not her signature, that the check was not authorized, and that the money was withdrawn from the account.

Exhibits five, six and seven were dated October 6, 2005, September 14, 2005, and September 22, 2005, respectively, and were each made payable to Dennis Sipes in the respective amounts of $200, $200, and $400. Mrs. Sipes acknowledged that she had signed these checks but testified that they were not authorized. The checks also bore the purported endorsements of Mr. Sipes and those of appellant. However, Mr. Sipes testified that it was not his signature on the endorsements and that he did not authorize these checks.

A person commits theft of property if he knowingly takes or exercises control over, or makes an unauthorized transfer of an interest in, the property of another person. Ark. Code Ann. § 5-36-103(a)(1) (Supp. 2007). Theft is a class C felony if the value of the property is less than $2,500 but more than $500. Ark. Code Ann. § 5-36-103(b)(2)(A).

Appellant's sufficiency-of-the-evidence argument is that State's exhibits one and two should not have been admitted into evidence, thus rendering the evidence insufficient to support the

conviction for theft of property. Appellant misunderstands the nature of our review. When reviewing a challenge to the sufficiency of the evidence, we consider *all* the evidence, *including that which may have been inadmissible. Fondren v. State,* 364 Ark. 498, 221 S.W.3d 333 (2006) (emphasis supplied). Appellant's argument is thus without merit. Even had this been a viable argument, the sufficiency of the evidence has not been preserved for our review. Appellant did not move for a directed verdict at the close of all evidence, which is required to preserve the sufficiency of the evidence in a bench trial under Rule 33.1(b) and (c). Although she did argue against conviction in her closing argument,[1] the supreme court has held that closing argument is no substitute for a motion for a directed verdict. *State v. Holmes,* 347 Ark. 689, 66 S.W.3d 640 (2002).

To the extent that appellant presents a separate argument against the admission of exhibits one and two, appellant contends that the trial court abused its discretion by admitting exhibits one and two because Mrs. Sipes, as a lay witness, was not competent to identify appellant's handwriting on the exhibits. *But see Criner v. State,* 236 Ark. 220, 365 S.W.2d 252 (1963) (holding that a lay witness may be qualified to express an opinion concerning the genuineness of a disputed signature or handwriting of the person in question if the witness appears to have some familiarity with the handwriting of the person in question, and further holding that the witness's degree of familiarity affects the weight of the evidence, but not its admissibility). We hold that appellant could not possibly have suffered any prejudice from the introduction of these exhibits. Appellant was convicted of a single count of theft of property as a class C felony, which as stated above is committed when the value of the property is between $500 and $2,500. Appellant makes no argument contesting the admission of exhibits 5, 6 and 7, which represent a theft of $800 when the amounts of these three checks are added together.

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[1] Appellant's counsel incorrectly labeled his closing argument in his abstract as a "Motion to Dismiss." That is a misrepresentation of the record. The record is clear that no directed verdict motion was made at the close of all evidence. There was only closing argument.

This evidence alone is sufficient to support the conviction as a class C felony. Therefore, any alleged error in the admission of exhibits one and two resulted in no prejudice. Even when a circuit court errs in admitting evidence, we will affirm the conviction if the error is deemed harmless. *Eastin v. State,* 370 Ark. 10, ___ S.W.3d ___ (2007).

Appellant also contends that the trial court erred by failing to consider what she asserts was impeachment evidence. During her cross-examination of Mr. Sipes, appellant suggested that the checks represented in exhibits 5, 6, and 7 were loans made by him to appellant, and appellant offered into evidence a complaint that Mr. Sipes had filed against appellant in district court to collect a loan-debt. The State objected because appellant had failed to disclose these matters in discovery. Appellant's counsel responded that he was under no obligation to disclose impeachment evidence, and when questioned by the trial court, counsel acknowledged that appellant would testify that Mr. Sipes had loaned her these monies. The trial court overruled the State's objection and allowed the admission of the complaint and further testimony on this subject.[2] However, the trial court stated that it would give little, if any, weight to the evidence presented because of appellant's discovery violation. When questioning of Mr. Sipes resumed, he stated that he had loaned appellant money at various times but that the lawsuit he filed to collect the money he had loaned had nothing to do with the checks that were in question at this trial. He said that had he known this would become an issue, he would have brought to court documentation of the loan, including the note prepared by appellant.

Appellant contends that she was not required to divulge this information in discovery because it was impeachment evidence and argues that the trial court erred by not attaching any weight to it.[3]

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[2] In addition to appellant's own testimony, appellant's former boyfriend, Danny McIntyre also testified that he paid money to Mr. Sipes to help appellant satisfy a debt.

[3] Appellant frames her issue in terms of a violation of the right to due process, but appellant made no due-process argument at trial. We will not address arguments, even constitutional ones, that are raised for the first time on appeal. *Young v. State,* 370 Ark. 147, ___ S.W.3d ___ (2007).

Appellant is mistaken. The evidence she sought to present was much more than evidence used to impeach a witness's testimony. It was instead her entire defense to the State's accusation that she had stolen money based on the checks in State's exhibits 5, 6, and 7. Rule 18.3 of the Arkansas Rules of Criminal Procedure provides that, subject to constitutional limitations, the prosecuting attorney shall, upon request, be informed as soon as practicable before trial of the nature of any defense which defense counsel intends to use at trial. Our supreme court has noted that discovery in criminal cases, within constitutional limitations, must be a two-way street. *McEwing v. State,* 366 Ark. 456, 237 S.W.3d 43 (2006). This requirement promotes fairness by allowing both sides the opportunity to full pretrial preparation, preventing surprise at trial, and avoiding unnecessary delays during the trial. *Id.* In the event of a discovery violation, the choice of an appropriate sanction is within the trial court's discretion. *Smith v. State,* 352 Ark. 92, 98 S.W.3d 422 (2003). Here, the assertion of this defense caught the prosecution by surprise and prevented it from adequately preparing a response to appellant's claim. We perceive no abuse of discretion in the trial court's ruling.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.